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Supreme Court of the United States

OCTOBER TERM, 1916

No. .....

PETER CALDAROLA,

Petitioner,

against

MOORE-McCORMACK LINES, INC.,

and

GERDA ECKERT and THOR ECKERT, JR., partners doing business under the firm name of THOR ECKERT & Co. (Defendants-Respondents in the Court below),

Respondents.

PETITION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

GLADSTEIN, ANDERSEN, RESNER & SAWYER,
Attorneys for Petitioner International Longshoremen's & Warehousemen's Union.

OF Counsel:
JACQUIN FRANK,
ARTHUR LEONARD ROSS.

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PETITION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The undersigned, as counsel for the International Longshoremen's and Warehousemen's Union, respectfully petition this Honorable Court for leave to file the accompanying brief *amicus curiae*.

The International Longshoremen's and Warehousemen's Union is a union consisting of approximately 75,000 members, most of whom perform work on shipboard or along-

side ships or connected with waterfront docks. Among the membership there are approximately 20,000 longshoremen who work in all of the ports of the Pacific Coast, including Alaska, as well as in the ports of the Hawaiian Islands.

The members of this organization are vitally interested in the position taken by the New York Court of Appeals in the above case, which was a suit by a longshoreman under circumstances frequently occurring in this employment. Longshoremen throughout the country have suits pending in the various courts throughout the United States that will be vitally affected by the ultimate outcome of the decision here. Moreover, for many years the said Union has sought, through collective bargaining, to improve the safety conditions on the Pacific Coast for its members, and has urged the adoption of a safety code. The Union is keenly conscious of the rights of its members whenever and wherever accidents occur involving maritime law, and is greatly concerned over improper limitations and restrictions of maritime rights. Furthermore, the Union has fostered legislation to broaden, extend and clarify the rights of longshoremen and has taken official positions before Congressional Committees in connection with and involving the rights of longshoremen.

Upon these considerations, special leave is respectfully sought to present the annexed brief in support of the petitioner's contention.

In advance of the preparation of this motion, counsel for the petitioner has secured the express consent of Abraham M. Fish, Esq., the attorney for the petitioner herein, to the filing of this brief as *amicus curiae*, but counsel for the respondent herein has declined so to consent.

WHEREFORE, your petitioner respectfully petitions this Court for leave to file the accompanying brief *amicus curiae*, and that the judgment of the New York Court of Appeals should be reversed.

GLADSTEIN, ANDERSEN, RESNER & SAWYER,
Attorneys for Petitioner,
240 Montgomery Street,
San Francisco 4, California.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JACQUIN FRANK, being duly sworn, deposes and says, that he is counsel for the attorneys for the petitioner named in the foregoing petition; that he has read the same, and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JACQUIN FRANK.

Sworn to before me this
4th day of March, 1947.

SARA RIELL.

Supreme Court of the United States

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Respondents.

BRIEF OF *AMICUS CURIAE*

Preliminary Statement

There is an important question of law in *Caldarola* v. *Moore-McCormack Lines*, 295 N. Y. 466, which directly affects longshoremen and persons having business on ships while in port. Many of them are members of the I. L. W. U. and many of them have suits pending in the various courts throughout the United States to recover damages for injuries sustained on board ship while in port for loading and discharging vessels.

The vital question is whether a State Court may disregard this Court's interpretation of a government contract in an action by a longshoreman against an operating agent servi

ing and maintaining a vessel under a uniform, standard contract identical with the contract construed by this Court in *Hust* v. *Moore-McCormack Lines, Inc.*, 90 L. Ed. 1220, 66 S. Ct. 1218. *Caldarola* sued for injuries suffered on shipboard of a vessel in port, caused by defects in its appurtenant appliances and equipment.

POINT I

This Court having found no difference in the functions of the operating agent under the Standard Agreement in the *Brady* case and the General Service Agreement in the *Hust* case (which is identical with the agreement in the instant case), the New York court was bound by such interpretation (a) of a maritime contract, (b) of an agreement with the United States. The meaning given to the General Service Contract by this Court makes the *Brady* case controlling.

The petitioner, a longshoreman, was injured while working on the deck of a ship while in port by the breaking of a defective cargo boom, a part of the ship's gear and which the jury held was defective.

The ship was being serviced by respondent under the General Agency Service Agreement with the United States.

The New York Court of Appeals held that:

(a) The respondent did not operate the ship and any failure on its part to perform duties assigned to it by the United States in connection with repairs to the ship was "strictly non-feasance" for which it was answerable to its principal, the United States and not to the petitioner.

(b) The *Brady* case is not authority for the petitioner's position, since in the *Brady* case the vessel was being operated by the agent under a different form of agreement with the United States, which agreement required the agent to man and operate it.

(c) The *Hust* case did not apply because the majority opinion held only that the Jones Act should be liberally construed so as to give Hust a cause of action thereunder against the "General Agent". It was only the concurring minority who held that under the General Agency Service Agreement the agent was in possession and control of the ship and, therefore, such holding was not binding on the New York Court.

(d) That it was not obliged to decide whether the *Hust* case should be followed as being a question of maritime law or because it is a construction of a contract to which the United States is a party.

As a matter of orderly and logical sequence in the development of our argument we believe it wise to first dispose of the New York Court's last contention (d) and discuss: 1. What agreements did this Court construe in the *Hust* case? 2. Is the New York Court bound to follow such construction, and why?

1. What agreements did this Court construe?

This Court considered at great length the General Service Agreement and the Standard Argreement involved in the case of *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, determining the meaning of the agreements as a whole, separate provisions, words, their effects, how the private operator functioned under them, a comparison between the two agreements, and reached the conclusion that the two agreements were, in effect, substantially the same and that, despite the "meticulous" differences, the operating agent functioned alike under both agreements.

In view of the holding in the *Brady* case, and our contention, *infra*, that the same is controlling in the case at bar, the question as to the binding force of this Court's interpretation of these two agreements in the *Hust* case on the New York Court becomes important.

2. Is the New York Court bound to follow such construction, and why?

At the outset we find that the question involved is a maritime question and, therefore, a Federal question to be determined by Federal law. Here, in fact, it is also a constitutional question (Art. 3, Sec. 2). On these questions there must be uniformity throughout the United States and the Federal construction is enforceable in the State Courts.

Knickerbocker v. *Stewart*, 253 U. S. 149, at p. 160.

Besides, the two agreements considered and construed in the *Hust* case were maritime contracts involving power conferred upon a government agency under Congressional laws and constitutional provisions referring to a system of law co-extensive with and operating uniformly in the whole country.

Union Fish Co. v. *Erickson*, 248 U. S. 308, at p. 313.

Moreover, the United States was a party to both agreements. This alone makes the Supreme Court's interpretation binding on all courts. In the most recent case on the subject, *S. R. A.* v. *Minnesota*, 90 L. Ed. 663, at p. 667, 66 S. Ct. 749 (decided March 25, 1946), the Supreme Court says (p. 754):

> "In determining the meaning and effect of contracts to which the United States is a party, the governing rules of law must be finally determined by this Court."

The cases on this point are legion, and the principle is so well settled that we shall not labor the point further.

Taking up the other contentions of the New York Court separately and stated seriatim they are:

> (a) The respondents did not operate the ship and any failure on its part to perform duties assigned to it by the United States in connection with repairs to the ship was "strictly non-feasance" for which it was answerable to its principal, the United States, and not to the petitioner.

The statement by the New York Court that the respondents did not operate the vessel in itself betrays the reason for its erroneous decision. "At the time of the injury, *the vessel was in port and was not being navigated.* Therefore the important question here is who maintains the vessel while in port, manages its business, furnishes supplies, loads and discharges its cargo, which required the services of the petitioner. As to respondents' complete control of these functions there was at no time any dispute. The New York Court, in its own opinion, cites some of the relevant powers of the respondents, putting them in complete charge of the vessel's business. The State Court seemed to be concerned only with the "operation and manning" of the vessel, which was not alone determinative here.

As to the New York Court's finding that the private operator owed no duty to the petitioner under its contract with the Government, and that the violation of its agreement which caused the injury was "strictly non-feasance" for which it was answerable only to its principal, the United States, the Court either overlooked entirely the Supreme Court construction of the General Service Agreement in the *Hust* case, or altogether declined to follow it.

It is clear that the New York Court made three errors in applying the rule that an agent is not liable to third persons for acts of omission. The first error was in its failure to follow the interpretation of the General Service Agreement as laid down in the *Hust* case, making the "operating agent" a principal, and its holding that the common law rules of "private agency" do not apply. This point we shall discuss *infra*. The second error was the fact that it did not take into consideration the exception to the common law rule of agency, because it does not apply in maritime cases where the so-called agent was under a legal duty as in the *Brady* case. The third error is an additional exception to the common law rule in cases where the so-called agent is an agent of the Government.

This exception is derived from English law and has been consistently followed, until now, in the State of New York. The rule is that where a contract is authorized by law, as it is here by presidential directive and acts of Congress, the agent is performing a public duty and, therefore, his contract with the Government is deemed to inure to the benefit of every individual interested in its performance. The failure of the respondent to perform according to its agreement, where non-performance would subject the Government to the payment of damages, makes the defendant liable on its contract for such non-performance to an injured third party.

In the leading case of *Robinson* v. *Chamberlain*, 34 N. Y. 389, the Court said, at page 392:

> "The principle he derives from the English authorities, and in which he concurs is, 'that whenever an individual or a corporation, for a consideration received from the sovereign power, has become bound by covenant or agreement, either express or implied, to do certain things, such individual or corporation is liable, in case of neglect to perform such covenant, not only to a public prosecution by indictment, but to a private action at the suit of any person injured by such neglect. In all such cases the contract made with the sovereign is deemed to inure to the benefit of every individual interested in its performance.' Id, 163."

The above case is also authority for the holding that an agent of the Government working under a contract pursuant to law assumes a duty to the public. If he is not to be regarded as a public officer in all respects; it is at least true that certain public functions which the United States would be obliged in the instant case to perform, as owner of the vessel, makes him a public officer for that purpose.

To the same effect see:

Little v. *Banks*, 85 N. Y. 258.
McMahon v. *Second Ave. R. R. Co.*, 75 N. Y. 232, at pp. 235, 237.
Restatement of the Law of Contracts, Sec. 145.

This was indeed the test that was applied by this Court in the *Hust* case when it held that the respondent's fallacy was that "it assumed the case would be controlled by the common law rules of *private* agency". A public agent is held to a higher degree of responsibility as shown *supra*.

A search for the *raison d'etre* of the rule shows that the theory upon which at common law an agent is not personally responsible to third parties for not doing something he ought to have done is that, having agreed with no one but his principal to perform them, in failing to do so he wrongs no one but his principal, who alone can hold him responsible, provided, of course, that no law imposed any duty upon him (Mechem On Agency, 2nd Ed., Vol. 1, Sec. 1464). Quite apart from the fact that the rule obviously does not apply to public agents, the rule, by its own limitation, is inapplicable in maritime cases because as to seamen and persons doing seamen's work on board a vessel the law imposes warranties of the seaworthiness of the vessel and its appurtenant appliances and equipment (*Mahnich* v. *Southern*, 321 U. S. 96; *Seas Shipping Co.* v. *Sieiacki*, 906 Ed. 809, 66 S. Ct. 872). Furthermore, the rule is not applicable here because:

(a) The private operator owed the petitioner a legal duty;

(b) The private operator was acting as a public agent performing a public duty;

(c) The private operator was performing under a maritime contract involving power conferred by the President and by Acts of Congress, to be interpreted not by State law but by Federal law;

(d) The private operator owed its performance thereunder not to a private principal but to a government, to wit: the United States, so that the petitioner was also interested in its performance.

The Court in the *Hust* case held the private operator not to be an "agent" in the generally accepted sense under the common law which would make an agent not liable to third persons for acts of omission.

The Supreme Court held the private operator liable as a principal, saying at pages 1226-1227 (66 S. Ct. 1218):

> "Here indeed is the respondent's fallacy, for it assumes the case would be controlled by the common-law rules of private agency. * * * No such application of the common-law 'control' test can be justified in this temporary situation unless by inversion of that wisdom which teaches that 'the letter killeth, but the spirit giveth life'."

The above finding was clearly based on the *principalship* of the operating "agent" and, indeed, it is the Court itself which puts quotes on the word "agent" (p. 1226). The finding that Hust was an employee of the respondent and that the respondent was the employer *pro hac vice* with the Government emphasizes the conclusion of principalship.

These conclusions are reached by the Court from its interpretation of the General Service Agreement and the functioning of the private operator under it. It follows from these findings that when the New York Court applied the common law rule of agency, to wit, the rule of nonfeasance, it was clearly an erroneous application of a common law agency rule to a case involving a principal.

In *Militano* v. *U. S. A.*, 156 F. (2d) 599, the Circuit Court of Appeals (2d Cir.), in a case, as here, involving a longshoreman, drew the proper legal conclusion from the finding in the *Hust* case that the operating agent was an employer of the crew. At page 602 the Court said:

> "If the agent remains the employer sufficiently to be liable to members of the crew under the Jones Act, we think it cannot escape the duties of an owner *pro*

hac vice in other respects. Thus it has the duty to furnish stevedores with a safe place to work, a duty which is analogous to that owed by a landowner to a business visitor. *Grillo* v. *Royal Norwegian Government*, 1943 A. M. C. 1357, 139 F. (2d) 237, 238 (2 CCA): see *Pioneer S. S. Co.* v. *McCann*, 170 Fed. 873 (6 CCA); *Glover* v. *Compagnie Generale Transatlantique*, 1939 A. M. C. 695, 103 F. (2d) 557, 559 (5 CCA), cert. den. 308 U. S. 550, 1939 A. M. C. 1419."

The next contention of the New York Court is:

> (b) The *Brady* case is not authority for the petitioner's position because in that case the vessel was being operated under a different form of agreement with the United States, which agreement, unlike the instant case, required the agent to man and operate the vessel.

The above holding of the New York Court will not stand analysis. To begin with, the Supreme Court, in the *Hust* case, called the differences between the two agreements "meticulous" and distinctly stated that these differences "make it hardly more than dubious that the respondent did not stand *pro hac vice* as employer with the Government" (p. 1228). After reciting the duties of the operating agent under the service agreement, the Court proceeds to say (p. 1230) (66 S. Ct. 1218):

> "With so much of the former relationship thus retained and so little additional risk thrown on the operating agent, it would be inconsistent not only with the prevailing law, but also with the agreements' spirit and general purpose * * * for us to rule that he (petitioner) was deprived of his long existing scheme of remedies. * * * *"

The Court's emphasis above on the "spirit" of the agreement, and its biblical quotation that "the letter killeth" and its quotes on its use of the word "agent" when referring to its use in the service agreement, and its finding of the differences between the two agreements as "meticu-

lous" are significant in interpreting the decision that the petitioner shall have his general maritime rights unimpaired.

The concurring opinion, restating the same idea, says (pp. 1232-1233):

> "The difference in words in those cases and the present one does not, on a view of the entire situation mark a difference in functions of the private operator."

Besides, like the petitioner Caldarola, Brady was a business invitee. The New York Court overlooked the fact that the Brady contract in providing that the private steamship company "operate and man" the vessel played no part in the decision of the Court. The vessel involved there, as here, was in port. In the *Hust* case, the Court strongly intimates that there would be no question of the private operator's liability had the case involved "evidence of negligence" showing "that respondent had failed to perform any duty in outfitting the ship or otherwise in relation to the delinquencies alleged to have constituted causes of the injuries" (Note No. 11, p. 1221). Significantly enough, the dissenters hold the same view. In the *Brady* case, the question was less complicated than in the *Hust* case because there was little doubt that when the vessel was in port the private operator had control of the vessel to perform its contractual obligation to "equip, victual, supply and maintain the vessel"—a duty that is present in the standard contract as well as in the General Agency Service Agreement (Art. 3(c)). Its power to "man and operate" was likewise not involved for the injured party was not a seaman, and the vessel was not being navigated. There was no question of negligence of the crew. There was involved, however, the negligence resulting from a defect in equipment, to wit, a ladder used by the intestate in boarding the vessel. The *Brady* decision fairly implies that it was the private operator's duty to furnish a ladder

without defects to its invitees. It was part of the ship's equipment. This conclusion is clearly based upon the duty of the private operator to furnish a ladder without defect, as here the respondent should have furnished a boom without defect.

The Court there held that (1) an agent is liable for his own negligence; (2) the fact that by its agreement with the United States Maritime Commission the steamship operator is exonerated has no binding effect on a third person not a party to the agreement; (3) the rights of principal and agent *inter se* are not the measure of the rights of third persons against either of them for their torts; (4) if Congress intended to exonerate agents they must say so in unmistakable terms.

The rationale of the rule in the *Brady* case is clear as in *Caldarola;* there was no overt act. Both agents under a contractual obligation to "furnish and maintain" permitted the defective equipment to remain on the vessel. The negligence was passive. The New York Court called it "nonfeasance", observing that the agent is exonerated because its obligation inured only to the benefit of the Government, and not to the invitee. That is the nub of the decision by the New York Court. If that decision prevails, then obviously it is in direct conflict with the *Brady* case.

In the *Hust* case the majority as well as the *dissenting minority* of the Court make clear that in cases like the one at bar, the questions determined there are not involved for the reason that, while in port, there is no question of "operate and man", and points out that as to other responsibilities both agreements were, in effect, alike.

The majority says (p. 1234) (66 S. Ct. 1218):

> "Whenever, in such cases, it might be found that technically the Government is the employer, the necessary result would be to remit the seaman to the 'exclusive' right to sue under the procedure provided by the Suits in Admiralty Act. In short the combined

effects of that Act and of the transfer of American shipping to governmental control, for the temporary period of the war, would be to confine merchant seamen altogether to suits under the Act, *except in the cases of men employed on vessels under time-charter and possibly as to injuries incurred by others through the general operating agent's failure to discharge some specific duty imposed by the General Service Agreement while the vessel is in port.* * * *" (Italics ours.)

The Court's footnote says:

"Such as, e.g., failing to provide needed repairs or supplies, but not including any act attributable to negligence on the part of the master or other members of the crew."

The Supreme Court of Oregon, in holding that Hust was not entitled to recover under the Jones Act, took care to point out that the ruling would be different if the negligent act were attributable to the manner of discharging any duty which the respondent owed while the vessel was in port. That language was confirmed by this Court verbatim. With that rule there was no disagreement in the *Hust* case by the dissenters. So, for instance:

"There is no reason here why the petitioner should not sue respondent for its alleged tort. What petitioner is attempting is to hold respondent liable as employer for negligence of petitioner's fellow servants of petitioner's superiors or the Master under the Merchant Marine Act * * *" (p. 1238).

And again:

"Certainly Hust did not lose his remedies against the agent for the agent's torts. He still has those remedies but petitioner wishes to hold the agent as an employer * * *" (p. 1238).

What torts could Hust have sued for without relying on the Jones Act? Obviously, they could only be those

breaches of obligation which were the Agent's responsibility. The most applicable obligations under the Agreement were Article 2 of the Agreement, whereby the General Agent promises to manage and conduct the business for the United States, Article 14, which provides that the Agent shall arrange for repairs of the vessels and all machinery, tackle, and "to maintain the vessel in a thoroughly efficient state of repair and condition", and Article 3A, subdivision (c) "Equip, victual, supply and *maintain* the vessels * * *". The words "*maintain* the vessels" could obviously only refer to maintaining the vessel and all its appurtenances and equipments, such as tackle and appliances, in a reasonably safe condition.

It is perfectly apparent that the various provisions in the instant contract cast a definite obligation upon the General Agent to do those things which the Government, in its far-flung activities during the war, could not do, and had, as of necessity, to rely upon the experience and the know-how of these private steamship companies.

The New York Court, recognizing the obligation of the Agent to perform these various functions, nevertheless holds that a violation of those contractual obligations was "strictly non-feasance", and exonerates the Agent from liability so far as the longshoreman is concerned. If the New York Court of Appeals' position is tenable, then Hust could not recover against the Agent under the General Maritime Law or even under the common law in a case where he never urged the Jones Act. To illustrate. Let us assume that Hust was injured while the vessel was tied up to a pier and, instead of being injured through an act of a fellow servant, he had walked over a covered hatch and fallen by the breaking of one of the hatch covers which was defective. That, we assume, is the type of tort for which Hust could recover against the Agent, as pointed out in the dissents quoted above. The New York Court, on the other hand, would hold the obligation to maintain proper hatch covers is an obligation inuring only to the benefit of the Government, and not to Hust. Such a con-

clusion obviously is fallacious if we take the standard of the *Brady* case and both the majority as well as the dissenting minority opinion in the *Hust* case.

Furthermore, the very use by the New York Court of the words "strictly non-feasance" is inept, under the circumstances.

In *Ellis* v. *McNaughton*, 76 Mich. 237, the Court defines misfeasance as follows:

> "Misfeasance may involve to some extent the idea of not doing, as where an agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances, as for instance, when he does not exercise that care which a due regard for the rights of others would require. This is not doing, but it is the *not* doing of that which is not imposed upon the agent merely by his relation to his principal, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes negligence in any relation, and is actionable. Mecham Ag., Sec. 572." (Court's italics.)

See also:

Dudley v. *Community Public Service Co.*, 108 F. (2d) 119.

Significant, indeed, is the language from 2 American Jurisprudence, page 254, Section 325, which we set forth:

> "On the other hand, an agent who violates a duty which he owes to a third person, that is a duty extending beyond the principal to the third person, is answerable for such consequences whether the act be an act of malfeasance, misfeasance or nonfeasance. Stated in this form there is probably no case to be found to the contrary. The attempt to work out the liability of the agent to the third person on the basis of the distinction in terminology indicated, rather than upon the exact nature of the duty which the agent owes the third

person, has aptly been described as a 'solemn legal jugglery with words'. Indeed, some courts, while stating the rule that an agent is not liable to a third person for nonfeasance, hold the agent liable for 'misfeasance' though the act is wholly one of omission."

The New York Court then concludes with the following:

(c) The *Hust* case did not apply because the majority opinion held only that the Jones Act should be liberally construed so as to give Hust a cause of action thereunder against the "General Agent". It was only the concurring minority who held that the General Agency Service Agreement the agent was in possession and control of the ship and, therefore, such holding was not binding on the New York Court as the majority opinion.

The above holding of the New York Court was prefaced by the statement (p. 466):

"In that case (*Hust*) the Supreme Court reversed a decision of the Supreme Court of Oregon which had dismissed the suit of plaintiff Hust, who unlike the present plaintiff, was a seaman. The 'General Agency' contract made between the United States and defendant in the Hust case was identical with the contract of the present defendants' with the government. But Hust's suit was brought under the 'Jones Act'."

While the factual distinction is true, it is, notwithstanding, also true that when a longshoreman, like the plaintiff, is engaged in a maritime service formerly rendered by the ship's crew, as here, he is to all intents and purposes a seaman. (*International Stevedoring Co.* v. *Haverty*, 272 U. S. 50.) The fallacy lies in the implication that, while it is admitted that the contract in the *Hust* case is the same as in the instant case, the construction of the contract is somehow inapplicable because the *Hust* suit was under the Jones Act.

The last word on this subject (April, 1946), the Supreme Court in *Seas Shipping Co.* v. *Sieracki,* at pages 879-880, says (66 S. Ct. 872):

> "* * * for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner. For these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards."

In the above case, as here, Sieracki, a stevedore, was injured by a boom which was supported by a defective shackle, while he was aboard ship. He was employed by an independent stevedoring company under contract to the shipowner to load the ship.

The difficulty with the New York Court's position is that it failed to recognize that the Supreme Court's construction of the service agreement with the Government in more ways than one applies equally to longshoremen as to seamen. It, in fact, applies as well to all persons having business on the vessel. This Court went to great length to compare the contracts in the *Brady* case and Hust agreement, and found them functionally alike. The *Brady* case was that of a custom officer. In that case Brady, too, was an invitee and the Court held that the case involved maritime rights even though the Jones Act was not involved.

Furthermore, the New York Court failed to recognize that the finding in the concurring opinion that the operating agent had the management of the vessel, as well as possession of it from the owner, the United States, thus making the respondent owner *pro hac vice,* was a finding restating in its own terms the finding of the majority of the Court. The concurring opinion was not a concurrence on grounds other than those of the majority opinion. The concurring judges distinctly state that they "add a few words" to "the result we have reached" as two of the majority justices to show that such result "is consonant with the traditional rules of liability" (p. 1233).

Even the dissenting justices in attempting to answer their prevailing brethren said (p. 1238): "It is suggested that the respondent may be in the position of a charterer or owner pro hac vice, etc." There would be no point in answering a concurring minority holding.

The term "owner", when used in connection with a vessel, includes more than the nominal owner and extends to all those who exercise substantial control over the vessel. Where the charter merely provides for the use of the vessel with possession and management retained by the owner, the charterer incurs none of the liabilities of an owner or operator. On the other hand, as here, the agreement provides that possession and management shall be transferred to the operator, then the operator becomes the owner *pro hac vice*, for the duration period and is fully subject to the duties and responsibilities of ownership (*U. S.* v. *Shea*, 152 U. S. 178; *Leary* v. *U. S.*, 10 Wall. 591; *Reed* v. *U. S.*, 11 Wall. 591).

In line with these decisions, the majority opinion, in analyzing and construing the two contracts and setting up alternatives and objections, first accepted the Oregon Court's conclusions that Hust was only "technically" the employee of the United States for the purposes of "ultimate control" in the performance of his work. Although the differences between the two agreements were "meticulous", it made its own finding on this basis that it was "hardly more than dubious that respondent did not stand *pro hac vice* as employer with the Government" under the service agreement. The majority opinion then proceeded to construe the service agreement according to its "spirit", not the "letter". It found little difference from "the mere fact that the terms of the standard agreement were changed to omit the provisions of manning the ship". This difference was relied upon by the New York Court in refusing to allow the *Brady* case as authority here. The Supreme Court, on the other hand, said: "If this made them technically and temporarily employees of the United States it did not sever altogether their relation to the operating agent . . .".

The majority opinion then further proceeded to make its own analysis of the agreement and pointed out some of the paragraphs in the service agreement that invested the private operator with the indicia of *pro hac vice* ownership, such as the hiring of the master and crew through the usual channels, retaining the role of paymaster, having the contractual duty to manage and conduct the business of the vessel assigned to it, the acceptance of the vessel and its duty to maintain the vessel in efficient state of repairs, its being indemnified against personal injuries, etc., thus finding management and possession of the vessel which are equal to the finding of the concurring opinion that the respondent is owner *pro hac vice* with the Government.

On the question of proof of *pro hac vice* ownership, the case at bar has developed even stronger evidence. The War Shipping Administration, in its own communications, regulations and directives to the respondent, used such phrases as "vessels operated by your company", "vessels assigned and delivered for operation under General Agency Agreement", "both at sea and in foreign ports", "masters have been instructed to report all breach of discipline to operating agent", and "all masters and officers in your employ".

The standard and uniform practice adopted by the Government and all private steamship companies with whom it enters into these agency agreements is that as soon as a Liberty ship is completed it is delivered at the shipyard to the operating agent who signs a formal receipt for the vessel, in which receipt the agent certifies that the named vessel owned by the United States was on a given date, at a given hour, at a given port, delivered to the private operator (naming it), under the service agreement, giving the number of the agreement and its date, and continues to say "having on board fuel, water, stores and equipment as per inventories taken on the date of delivery".

Of course delivery of the vessel is already fully set forth in the service agreement and in it is also a provision for

its return to the Government upon the termination of the agreement; but the above is a required formal receipt and, in addition, there is a formal receipt for the ship's gear. That is how the Government itself makes sure that possession of the vessel is delivered.

Possession of the vessel and its management are the two prerequisites for ownership *pro hac vice*.

FINAL POINT

The judgment of New York Court of Appeals should be reversed and such action taken by the Court as is appropriate.

Respectfully submitted,

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